# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 3, 2003 |
| v | No. 233494<br>Wayne Circuit Court |
| REGINALD A. WALKER,<br><br>Defendant-Appellant. | LC No. 00-009268 |

Before: Kelly, P.J., and Jansen and Donfrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant now appeals as of right. We remand for a *Ginther*[1] hearing on defendant's ineffective assistance of counsel claim regarding his trial counsel's failure to present an insanity defense.

Defendant's convictions arise from the shooting death of Larry Troup at Sam's Drugs at 14200 Fenkell in Detroit on April 11, 2000. The prosecution presented testimony that at about midnight, Walter Gaiter and Troup entered the store to purchase some beer. After paying for the beer at the checkout counter, Gaiter leaned back into defendant, who was behind them. After Gaiter apologized for bumping into defendant, defendant told him that he did not like being touched, which defendant repeated after he paid for his purchases. Pausing, defendant then pulled an automatic handgun from under this jacket and fired three or four shots, killing Troup instantly. Neither Gaiter nor Troup was armed. Defendant then picked up the clip that had fallen to the floor, put it in his pocket, and walked out the store.

Testifying in his own behalf, defendant maintained that he did not intend to kill anyone that night. During the late afternoon and evening before going to the store, defendant consumed two 40 ounce bottles of beer and a significant quantity of vodka. Defendant testified that he went to Sam's Drugs to buy liquor and cigarettes, and was standing in line behind Gaiter and Troup. According to defendant, he was wearing about $1,500 in jewelry when Gaiter put his arm around him and said, "That's some nice jewelry you got on, man, old man." Defendant further testified that Gaiter had his hand in his pocket when he commented about defendant

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

being drunk and that he could get robbed. When Gaiter then tried to force defendant into one of the aisles, Troup, showing him a pistol in his belt, told defendant not to run. According to defendant, Troup then bumped him. In response, defendant pulled his pistol from his waist area. At the same time, Gaiter pulled out a gun and shot defendant, hitting him in the hand. Because defendant's hand was on the trigger, his gun went off. According to defendant, he did not know that Troup had been shot.

I.

On appeal, defendant first claims that he was denied the effective assistance of counsel because his trial counsel failed to seek an independent psychiatric evaluation to support the presentation of an insanity defense. Defendant, who was 46 years old at the time of trial, had a lengthy and extensive history of mental illness, stemming from a long-standing condition of schizophrenia, from which he has suffered since he was 15 years old. Because it does not appear that an evidentiary hearing was held on this issue, our review is limited to the facts contained in the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). We review questions of constitutional law de novo. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove that his counsel's performance was deficient, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Leblanc, supra*, 465 Mich 578; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Leblanc, supra*, 465 Mich 578*; Toma, supra*, 462 Mich 302-303.

Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy or assess counsel's competency with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* The decision whether to present an insanity defense can be an issue of trial strategy, and this Court will not reverse where failure to raise an insanity defense is a question of trial strategy. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). Insanity is an affirmative defense that requires proof that, as a result of mental illness or mental retardation, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to

conform his conduct to the requirements of the law. MCL 768.21a(1); see also *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001). The defendant bears the burden of proving the defense of insanity by a preponderance of the evidence. MCL 768.21a(3); *Carpenter, supra,* 464 Mich 231.

Defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to seek an independent psychiatric evaluation in support of his presentation of an insanity defense. In this case, defense counsel filed a notice of intent to present an insanity defense, and the court ordered that defendant undergo a mental examination by a court psychiatrist pursuant to MCL 768.20a(2). The mental evaluation was conducted by a psychiatrist at the Wayne County Circuit Court Psychiatric Clinic, who concluded that defendant was competent to stand trial and that he was not mentally ill or mentally retarded at the time he shot the victim. According to that evaluation, there was no evidence that defendant was substantially unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Further, the examining psychiatrist concluded that defendant was able to form the requisite intent to commit first-degree murder.

Even though an indigent defendant in Michigan, such as defendant in this case, may request an independent psychiatric evaluation by a clinician of his choice pursuant to MCL 768.20a(3), defense counsel never sought an independent psychiatric evaluation for his client and did not pursue an insanity defense at trial. Instead, trial counsel, who was clearly aware of defendant's long history of mental illness, elected to forego the presentation of an insanity defense in order to argue the defenses of accident, self-defense and intoxication based on defendant's version of the events presented at trial.

Here, trial counsel's decision not to pursue an insanity defense, but to present the conflicting defenses of accident and self-defense based on defendant's testimony, was objectively unreasonable. Specifically, although defense counsel filed a notice of intent to present an insanity defense, he did not avail himself of the statutory entitlement to have an independent psychologist examine defendant to determine whether he was legally insane at the time of the acts in question. According to the affidavit of Dr. Steven Miller, an independent certified forensic examiner who conducted a post-conviction mental status evaluation, defendant was "legally insane" at the time he murdered the victim. Under these circumstances, trial counsel's decision to forego the insanity defense was a serious error that fell below an objective standard of reasonableness under the Sixth Amendment to the United States Constitution, not a matter of trial strategy. See *Profitt v Waldron*, 831 F2d 1245 (CA 5, 1987) (finding that trial counsel was ineffective for failing to investigate the defendant's prior mental history for the presentation of an insanity defense). As defendant correctly points out, because his trial counsel did not sufficiently investigate the insanity defense by obtaining an independent evaluation to rebut the evaluation provided by the forensic center, he was not in a position to make a reasoned choice whether such a defense would succeed in this case.

However, based upon the present record, we cannot say whether counsel's error in this regard was prejudicial so as to deny defendant a fair trial. For that reason, we remand to the trial court to conduct an evidentiary hearing to develop a record and to make findings of fact and conclusions of law regarding whether trial counsel's error in failing to seek an independent evaluation of defendant in support of the presentation of an insanity defense was prejudicial. *Leblanc, supra,* 465 Mich 578*; Toma, supra,* 462 Mich 302-303. If the trial court concludes that

trial counsel's error was prejudicial, i.e., the result of the proceeding would have been different, then it should reverse defendant's convictions and order a new trial.

II.

None of defendant's remaining claims on appeal has any merit. Contrary to defendant's claim, the trial court did not err when it denied his pretrial motion to suppress the evidence seized from the house after he was arrested. We review the trial court's factual findings for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). To the extent that a trial court's ruling on a motion to suppress includes an interpretation of law or application of a constitutional standard to uncontested facts, our review is de novo. *Id.*

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11, *Illinois v McArthur*, 531 US 326; 121 S Ct 946, 949; 148 L Ed 2d 838, 847 (2001); *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "Because there is no expectation of privacy in abandoned property, and because Fourth Amendment protections apply only when there is such an expectation of privacy, the defendant bears the burden of showing that the property searched was not abandoned." *People v Rasmussen*, 191 Mich App 721, 755; 478 NW2d 752 (1991), citing *People v Romano*, 181 Mich App 204, 214; 448 NW2d 795 (1989). Regarding abandoned or vacant structures, the trial court must perform a case-by-case evaluation of certain objective factors pertinent to the totality of the circumstances inquiry. *People v Taylor*, ___ Mich App ___ NW2d ___ (Docket No. 237223, issued 10/8/02, slips op, p 4. Among the factors to be considered are 1) the outward appearance; 2) the overall condition; 3) the state of the vegetation on the premises; 4) barriers erected and securely fastened in all openings; 5) indications that the home is not being independently serviced with gas or electricity; 6) the lack of appliances, furniture or other furnishings typically found in a dwelling house. *Id.*

Applying the objective factors set forth in *Taylor* to the present case, we conclude that there was no violation of the Fourth Amendment when the police conducted a warrantless search of the house in which defendant was arrested because the police could have reasonably inferred that the house was abandoned. At the suppression hearing, there was testimony from the police officers that from the outside, the boarded-up house appeared very "shabby" and dark; the bushes and yard had not been maintained; there were broken and missing windows throughout the house; and the locks and hinges on the front door were hanging loosely from the door. The house also appeared from the outside to be unoccupied, and the back door of the house did not have functional locks, and in fact, was not even attached to the house. There was no functional plumbing, and the house appeared to be wired via an extension cord from the adjoining house. Further, the interior of the house was in "total disarray," with dirty mattresses and clothing on the floor. Because the totality of the circumstances support a reasonable inference that the house was abandoned, it is of no moment whether defendant had the owner's permission to be in the house, since the police did not violate any legitimate expectation of privacy protected under the Fourth Amendment when they entered the house without a warrant.

III.

Defendant also claims that he was denied the effective assistance of counsel because, during the hearing on defendant's motion to suppress, defense counsel failed to present witnesses

who could have rebutted the police officers' testimony that the house was abandoned. Because defendant failed to preserve this issue on appeal, our review is limited to the existing record. *Wilson, supra*, 242 Mich App 352. Based upon our foregoing conclusion that the police could have reasonably inferred that the house was abandoned, defendant cannot show that he suffered prejudice as a result of his trial counsel's presumed error in this regard. *Toma, supra*, 462 Mich 302-303.

IV.

There is also no merit to defendant's claim that the trial court denied him the opportunity to argue in propria persona his motion for a new trial or that the court failed to issue a ruling on the motion in violation of MCR 6.431(B). After defendant was sentenced on March 19, 2001, the trial court received his request for appellate counsel on March 22, 2001. Thereupon, the trial court entered a claim of appeal on behalf of defendant on March 29, 2001 and appointed counsel to represent him. In the meantime, defendant filed a motion for a new trial in propria persona, and the trial court subsequently held a proceeding on the motion on March 30, 2001. As the transcript of the motion hearing reveals, the attorney assigned by the trial court to assist defendant was unsuccessful in convincing him that the most effective way to proceed would be to allow appointed appellate counsel to file his motion and argue it. The assigned attorney stated on the record that defendant wanted to argue the motion immediately, without waiting for the appointed appellate counsel or the filing of a transcript of the trial. In response, the trial court indicated on the record that defendant could file such a motion once a transcript of the trial was available. Thereafter, defendant did not pursue the matter in the trial court, but rather filed a second motion for a new trial with this Court on May 20, 2002. In this motion, defendant alleges the same facts and trial court error with respect to this issue as he does now on appeal. However, while the praecipe was signed and date stamped, the accompanying motion and other documents did not bear defendant's signature, and have not been stamped. Under the circumstances, we find no merit to defendant's claim of error.

V.

Finally, defendant claims that he was denied his right to due process because the prosecutor and lead investigator attempted to intimidate a witness into suborning perjury. Because defendant failed to object to the prosecutor's conduct during trial, we review defendant's claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In support of his claim, defendant has attached to his supplemental brief an affidavit of Sharon Bass, who contends that the prosecutor intimidated her in an effort to persuade her to testify for the prosecution. However, there is nothing in the existing record to indicate that the prosecutor tried to intimidate Bass, or even attempted to get Bass to provide untruthful testimony. Accordingly, defendant has failed to show plain error regarding his prosecutorial misconduct claim.

Remanded. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio